IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. ———

MARTIN G. TAUB; JOSEPH B. WOHLMAN; ABNER B. TAUB; and CHARLES HOFFMAN, of Jersey City, New Jersey, *Petitioners,*

v.

CHESTER BOWLES, PRICE ADMINISTRATOR.

BRIEF IN SUPPORT OF PETITION.

ON THE QUESTION OF JURISDICTION OF THE UNITED STATES EMERGENCY COURT OF APPEALS.

The Court below held that the legislative history of the amendment of June, 1944, to the Emergency Price Control Act, embodied in the newly added Section 204 (e), clearly disclosed that the Congressional purpose underlying its enactment was to cure the defects in the original Act which were made apparent by the decision of this Court in *Yakus* v. *United States* (321 U. S. 414).[9]

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[9] R. 83-84.

It concluded its analysis of the legislative history and Congressional intent with the following observation:[10]

> "We think it obvious, therefore, that Congress had in mind an amendment which would afford an opportunity to every diligent person charged with violating a regulation or with conspiring to violate it, to have a hearing upon the question of validity."

The court below concludes, however, that although the legislative intent to include indictments for conspiracy to violate regulations under the Emergency Price Control Act was clear, it was equally clear from the language of the amendment as finally enacted that an indictment for conspiracy under 18 USCA, Section 88, was beyond its scope.[11] Relying upon the well established principle of statutory construction that legislative history cannot expand or enlarge the meaning of unambiguous legislative enactments, the Emergency Court arrives at the conclusion that it is without jurisdiction to consider the validity of a regulation drawn into issue under an indictment for conspiracy under 18 USCA, Section 88.[12]

If this conclusion is correct, another immediately emerges as its obvious corollary. If the United States Emergency Court of Appeals is without jurisdiction, then no court has jurisdiction (*Yakus* v. *United States*, 88 L. Ed. 653; *Old Monastery Co.* v. *United States*, 147 F. (2d) 905). From this flows one of two alternatives which, in the final analysis, leads but to one ultimate result, namely, that the conspiracy statute (18 USCA, Section 88) is not a lawful vehicle for prosecuting offenders who agree to violate the Emergency Price Control Act and its regulations.

The first alternative which postulates this inevitable result is that Congress intended to provide a means for prosecution of Office of Price Administration violations which, if

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[10] R. 84.
[11] R. 84.
[12] R. 85.

invoked, would deprive the defendant of an opportunity to challenge the validity of the regulation forming the substantive basis for the criminal charge. Such an alternative is patently untenable. To adopt it would be to disregard the plain Congressional intent underlying enactment of Section 204 (e), whose object as the court below pointed out[13] was to "afford an opportunity to every diligent person charged with violating a regulation or with conspiring to violate it, to have a hearing upon the question of validity." A criminal prosecution under such circumstances would plainly contravene the basic requirements of the Fifth Amendment and would constitute a denial of due process in its grossest form. It certainly would fall far short of the minimal requirements contemplated by this Court in the *Yakus* case (Supra, 88 L. Ed. at 665), when it declared (with reference to restricting judicial review of the administrative determination to a single court):

> "Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; First Nat. Bank v. Weld County, 264 U. S. 450, 68 L. ed. 785, 44 S. Ct. 385; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816."

Nor is it any answer to suggest as did the court below that it would have had jurisdiction if the matter had come to it by way of protest from the Price Administrator.[14] The petitioners pursued their remedy under Section 204 (e) which by its terms required, as a condition precedent to the granting of leave to file a complaint in the United States Emergency Court of Appeals, a finding by the District Court that "there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 230 (a)". The District

[13] R. 84.
[14] R. 85.

Court so found.[15] Its order and judgment in that respect was not open to challenge by the Price Administrator in the proceedings below and is conclusive.

The second alternative is that Congress intended to write its own conspiracy statute into the Emergency Price Control Act and thereby made 18 USCA, Section 88 inapplicable to Emergency Price Control violations and obviated the necessity for recourse to that general conspiracy statute to reach such infractions. This conclusion expresses the true Congressional intent. It is spelled out by the specific language of the Act and completely fits the statutory procedural pattern prescribed for challenging the validity of regulations under the Act. Thus, Section 4 (a) not only condemns as unlawful the sale of any commodity in violation of a price schedule, but declares it to be unlawful to offer, solicit, attempt or agree to do any of the foregoing. Consistent with this statutory proscription, Maximum Price Regulation 193, Section 1420.1, not only condemns the selling, buying and delivering of domestic distilled spirits for prices in excess of the regulation, but declares: "... no person shall agree ..." to do any of the foregoing. The same language is found in Maximum Price Regulation 445, Section 7.8: "... and no person shall agree, offer, solicit or attempt to do any of the foregoing."

The inclusion of an agreement to commit an offense within the definition of the substantive offense itself is, so far as Counsel has been able to determine, a statutory anomaly and of itself goes far to support the conclusion that Congress intended in this temporary emergency legislation to provide a separate and exclusive vehicle for prosecutions for conspiracy bottomed upon agreements to violate regulations under the Emergency Price Control Act. This conclusion is given added support by Section 205 (c) of the Act which obviates the problem of venue so often invoked as a justification for the use of 18 USCA, Section 88. Section 205 (c) declares that such criminal proceedings (under Sec-

[15] R. 13.

tion 205) may be brought in any district in which any part of any act or transaction constituting the violation occurred.

When to all the foregoing is added the plain language under Section 204 (e) which so unequivocably encompasses only the Emergency Price Control Act and the regulations promulgated thereunder (see analyses by court below),[16] the conclusion is inescapable that the Emergency Price Control Act contains its own exclusive proscription against conspiracy and that 18 USCA, Section 88, is consequently not available as a vehicle for prosecuting conspiracies to violate Office of Price Administration regulations.

The United States Circuit Court of Appeals for the Fourth Circuit in *Old Monastery Co.* v. *United States* (147 F. (2d) 905) held otherwise upon the precise point here at issue. It quoted with approval from *United States* v. *Chicco and Stauss* (59 F. Supp. 211) which, relying on the *Yakus* case (*Supra*) asserted: "... it follows as an inevitable conclusion that rules or orders promulgated by the Administrator, pursuant to the provisions of the Act, are not subject to attack in the district courts of the United States, whether the case used as the occasion for the attack be civil or criminal ...", and then proceeded to flatly hold that the only forum where such attack could be made was the United States Emergency Court of Appeals, quoting the full text of Section 204 (e) as its authority. (147 F. (2d) 906)

WITH RESPECT TO CONSTITUTIONAL ISSUES.

Petitioners are uncertain as to the propriety of pressing the constitutional issues in the present posture of the case. The decision of the court below was bottomed upon the jurisdictional issue. Holding as it did that it lacked jurisdiction over the complaint, its views upon other issues not being essential to its decision were, as characterized by Justice Laws in his partial dissent, merely "obiter dictum".[17] Whether such dicta afford a proper basis for review by this

[16] R. 84-85.
[17] R. 89.

Court is at least questionable. Petitioners, therefore, confine this portion of the memorandum in support of their petition for a writ of certiorari to a skeletonized reference to those cases wherein this Court has had occasion to consider the impact of the Twenty-first Amendment on the regulation and control of intoxicating liquor.

Board v. *Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38;
Mahoney v. *Joseph Triner Corp.*, 304 U. S. 401, 58 S. Ct. 592, 82 L. Ed. 1424;
Indianapolis Brewing Co. v. *Liquor Control Commission*, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243;
Finch v. *McKittrick*, 305 U. S. 395, 59 S. Ct. 256, 83 L. Ed. 245;
Ziffrin v. *Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128;
Carter v. *Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 387.

The substance of these decisions as petitioners view them is that intoxicating liquor is "sui generis" and occupies a unique constitutional classification not applicable to any other article of commerce; that questions pertaining to the regulation and control of liquor are political and by their nature largely within the exclusive domain of the several states so as to exclude them from regulation by national legislation.

Whether, in view of this national policy so firmly imbedded in the law by the repeated pronouncements of this Court, the war power may be invoked as justification for utilizing a temporary federal emergency statute to establish ceiling prices for the sale of intoxicating liquor to the citizens of the several states on the theory that such price limitation subserves the avowed purpose of this wartime legislation, is a question which has not heretofore claimed the attention of this Court.

Moreover, it involves questions of fact which petitioners had no opportunity to develop below. The determination by the United States Emergency Court of Appeals that it

lacked jurisdiction over the complaint effectually barred petitioners from presenting evidence upon which they would have relied to demonstrate the total irrelevance between the maintenance of a low price for liquor to winning the war through attainment of the purposes ascribed to the Emergency Price Control Act by the declaration embodied in Section 1 (a) of that Act.

In the light of facts of which this Court, through its experience with litigation on a subject which has for so long been "the fruitful apple of judicial discord,"[18] might take judicial notice, it may well be that even in the absence of evidence of the character contemplated by the petitioners, this Court may conclude that on its face the national regulation of the price of intoxicating liquor subserves no purpose consonant with the objectives of the Emergency Price Control Act.

Respectfully submitted,

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[18] Concurring opinion of Mr. Justice Frankfurter in Duckworth v. Arkansas, 314 U. S. 390, quoted in R. 67.